BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHRISTOPHER L. RICKARD	)	
Claimant	)	
	)	
VS.	)	
	)	
NATIONAL GYPSUM COMPANY	)	
Respondent	)	Docket Nos. 1,021,390 and
	)	1,021,513
AND	)	
	)	
ACE AMERICAN INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the June 14, 2005, preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark.

ISSUES

The ALJ found claimant was injured out of and in the course of his employment with respondent on January 25, 2005[1], when he aggravated a preexisting condition in his low back. The ALJ ordered temporary total disability compensation paid beginning January 29, 2005, until claimant is released, and authorized Dr. John P. Gorecki as claimant's treating physician.

The respondent requests review of whether claimant sustained a personal injury by accident arising out of and in the course of his employment with respondent either "in August/September 2003" or "on January 24, 2005."[2] In the alternative, respondent claims that there is no indication that claimant needs surgery as relates to the claimed injury of January 24, 2005. Respondent also raises issues concerning whether claimant gave

[1]Although the ALJ's Order (June 14, 2005) indicates a date of accident of January 25, 2005, the record and the briefs of the parties indicate that the correct date of accident is January 24, 2005.

[2]Respondent's brief at 2 (filed July 19, 2005).

timely notice and written claim "for an accidental injury occurring in August/September 2003."[3]

Claimant requests that the Board affirm the decision of the ALJ.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant has filed two workers compensation claims for injuries to his low back. Docket No. 1,021,513 alleges a date of accident of September 2003 and every day thereafter, and Docket No. 1,021,390 alleges a date of accident of January 24, 2005, and every day thereafter. The ALJ's Order bears both docket numbers, but it appears benefits were awarded in Docket No. 1,021,390 because the ALJ found a specific accident date of January 25, 2005. Although respondent's Application for Review bears only Docket No. 1,021,390, the cases were consolidated for the preliminary hearing. Furthermore, respondent's brief to the Board discusses and raises issues concerning both alleged series of accidents in both docketed claims. Therefore, this appeal will be treated as an appeal of both docketed claims, including Docket No. 1,021,513.

Claimant began working for respondent on August 4, 2003, as an underground loader. Claimant states that shortly after he started working for respondent, about September 2003, he injured his low back while unloading hard powder. At the time he was working with Jesse Rickman, a mine engineer who was supervising, and Shane Carr. He told both Mr. Rickman and Mr. Carr that he had messed up his back and that it was tight. He claims that they all three thought he had pulled some muscles in his back. He finished his shift and went home. Mr. Carr testified that he remembered the incident but could not remember a specific date. Mr. Rickman testified that he had no memory of the incident but did not state that it did not happen, just that he could not recall it happening. Claimant did not miss any work for this injury. However, Mr. Rickman testified that had claimant told him of an injury, he would have had to initiate some paperwork. Mr. Rickman stated he did not initiate any paperwork for an injury to claimant in September 2003.

Claimant saw his personal physician, Dr. Kirk Bliss, on October 22, 2003, complaining of extreme back pain. He told Dr. Bliss that he did not remember a specific injury and does not remember doing anything out of the ordinary. Claimant had an MRI in November 2003 which showed a disk herniation at L5-S1.

Claimant said he did not advise his supervisor, the safety director or Dr. Bliss about his September 2003 injury for fear it would jeopardize his employment. However, he

[3] *Id.* at 2.

testified that if he had known the injury was more than a misalignment, he would have told his supervisor. Claimant submitted all his bills for treatment and tests to his personal health insurance company.

Dr. Bliss sent claimant to Dr. Gorecki for a neurological consultation on December 14, 2004. Dr. Gorecki's records indicate surgery was discussed, and Dr. Gorecki noted that claimant would have a difficult time tolerating the required time off. Claimant's next visit with Dr. Gorecki was on Friday, January 21, 2005. At this time, Dr. Gorecki recommended discography on claimant's back and discussed possible surgery, depending upon the results of the discography.

On Monday, January 24, 2005, claimant and a co-worker, Troy Campbell, were preparing to shoot a shot of rock underground. While walking back to a pickup after setting the fuse, claimant stepped off into a hole or unlevel ground and almost went down, but caught himself on the edge of the pickup. Claimant testified that the fall paralyzed him for just a minute and then he felt sharp pains in his back. Mr. Campbell testified that he was present and saw claimant stumble.

Claimant immediately called his supervisor, Mark Long, and told him that he had injured himself. The accident occurred about quitting time, and claimant went home. He testified the pain was worse the next morning. Claimant continued to work the next three days and then called Mr. Long on Friday and told him he could not work. Claimant asked Mr. Long for medical treatment and was referred to Nick Burns, respondent's safety director. Mr. Burns was not available when claimant called, so claimant went to see Dr. Bliss, who prescribed some painkillers. Claimant tried to go back to work the next Monday but was told by Mr. Long that he could not return to work until he was released from the doctor with no restrictions.

Claimant has not been back to see Dr. Gorecki since his January 21, 2005, appointment. He did see Dr. Bliss on January 28, 2005, and obtained some pain medication.

On cross-examination, claimant admitted he had previous complaints with his back getting out of adjustment in 2002 while working for a trucking company. He sought treatment from Dr. Bliss and a chiropractor. Claimant admitted that he saw Dr. Bliss on June 3, 2003, which was before he started working for respondent, and that he told Dr. Bliss his back had been bothering him for several months. Claimant again saw Dr. Bliss on July 10, 2003. Dr. Bliss' records indicate that claimant told Dr. Bliss that he had been moving cattle and working bulls and had been thrown around against some panels on several occasions. Claimant's testimony was inconsistent about whether in August 2003, when he started working for respondent, his back was or was not hurting.

Nick Burns is the administrative manager of respondent and part of his responsibility is safety director. Respondent's policy is that an employee must report to Mr. Burns as

soon as he or she has a work-related injury. This policy is set out in paperwork which was signed by claimant when he started working at respondent, and it is one of the subjects of safety meetings which employees attend once a year.

Mr. Burns testified that claimant was given a verbal warning about absenteeism sometime in 2004. Then in late 2004 or early 2005, before claimant's accident, claimant gave him some Family Medical Leave Act (FMLA) papers signed by Dr. Gorecki so claimant could take time off work for his back problems. Mr. Burns had no conversations with claimant concerning whether the FMLA leave was being requested for a work-related injury.

The Workers Compensation Act places the burden of proof upon a claimant to establish his or her right to an award of compensation and to prove the conditions on which that right depends.[4] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[5]

An injury arises out of employment if it arises out of the nature, conditions, obligations and incidents of the employment.[6] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[7]

Claimant has a history of back problems that pre-date the accidents alleged in this case. Nevertheless, it is well settled in this state than an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[8] "The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the

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[4] K.S.A. 44-501(a); *see also Chandler v. Central Oil Corp.*, 253 Kan. 50, 53, 853 P.2d 649 (1993); *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 240, 689 P.2d 871 (1984).

[5] K.S.A. 2004 Supp. 44-508(g); *see also In re Estate of Robinson*, 236 Kan. 431, 439, 690 P.2d 1383 (1984).

[6] *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

[7] *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 502, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

[8] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 377, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 202, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 336, 678 P.2d 178 (1984).

condition."[9] No standard of health is prescribed by the Act, and the worker is taken in his or her condition at the time of the alleged accident.[10]

It is suspicious that claimant is alleging he reinjured his back at work on Monday, January 24, 2005, after seeing his doctor on Friday, January 21, 2005, and being told that he may require back surgery. Nevertheless, claimant's testimony is corroborated by his co-worker, Troy Campbell. And the ALJ apparently found claimant's testimony to be credible. Based upon the record presented to date, the Board finds that claimant suffered a work-related aggravation to his preexisting back condition on January 24, 2005. Accordingly, the ALJ's preliminary hearing Order should be affirmed.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.[11]

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge John D. Clark dated June 14, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September, 2005.

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BOARD MEMBER

c: J. Shawn Elliott, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[9] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, Syl. ¶ 3, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[10] *Strasser v. Jones*, 186 Kan. 507, 350 P.2d 779 (1960).

[11] K.S.A. 44-534a(a)(2).